Supreme Court, U.S.
FILED

961715 APR 21 1997

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

STATE OF ARIZONA,
PETITIONER,

-vs-

DANIEL RICHCREEK,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

GRANT WOODS
ATTORNEY GENERAL

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION

CONSUELO M. OHANESIAN
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686

ATTORNEYS FOR PETITIONER

45 pp

QUESTION PRESENTED FOR REVIEW

Did the Arizona Supreme Court err, as a matter of federal constitutional law, by holding that the forced stop of an automobile, without an articulable suspicion of criminal activity, is an unconstitutional seizure under the Fourth Amendment?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINION BELOW 1

STATEMENT OF JURISDICTION 2

PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 10

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

TABLE OF AUTHORITIES

CASES — PAGE

Cady v. Dombrowski,
413 U.S. 433 (1973) 7-10

Florida v. Royer,
460 U.S. 491 (1983) 7

State v. Marcello,
599 A.2d 357 (Vt. 1991) 9

State v. Oxley,
503 A.2d 756 (N.H. 1989) 9

State v. Pinkham,
565 A.2d 318 (Me. 1989) 9

State v. Vistuba,
840 P.2d 511 (Kan. 1992) 9

Terry v. Ohio,
392 U.S. 1 (1968) 7-9

United Stated v. Rideau,
949 F.2d 718 (5th Cir. 1991) 8, 9

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 7

United States v. King,
990 F.2d 1552 (10th Cir. 1993) 8

United States v. Wallace,
889 F.2d 580 (5th Cir.1989) 8, 9

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 8, 10

U.S. Const. art. III, § 2 2

STATUTES

28 U.S.C. § 1254(1) 2

A.R.S. § 28–4834 . . . . . A-8

RULES

Rule 10.1, Rules of Supreme Court 2

OPINION BELOW

On January 21, 1997, the Arizona Supreme Court issued an opinion vacating the Arizona Court of Appeals' opinion on the sole issue of suppression of evidence gathered after the stop of an automobile. A copy of the Arizona Supreme Court's opinion is in the Appendix at A, a copy of the Arizona Court of Appeals' opinion is at Appendix B. The mandate of the Arizona Supreme Court ordering the cause remanded for new trial is included in the Appendix at C.

STATEMENT OF JURISDICTION

The Arizona Supreme Court issued its opinion on January 21, 1997. Pursuant to Supreme Court Rule 10.1, this petition for writ of certiorari was required to be filed by Petitioner within 90 days. Therefore, this Court's jurisdiction vests pursuant to United States Constitution Article III, Section 2 and 28 U.S.C. § 1257.

PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part:

> The right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures, shall not be violated.

STATEMENT OF THE CASE

Procedural History of the Case

The State charged Respondent with theft, a class 3 felony. The State later amended the charge to a class 4 felony. After his motion to suppress the evidence that he was driving a stolen car was denied, Respondent knowingly, intelligently, and voluntarily waived his right to a jury trial, and submitted the case on the record to the trial court. The trial court found Respondent guilty, suspended sentence, and placed him on 3 years probation. On appeal, Respondent challenged the legality of the police stop of his car, and the admissibility of the evidence they acquired after the stop. On February 29, 1996, the Arizona Court of Appeals affirmed Respondent's sentence and conviction on the basis that the police stopped Respondent pursuant to the investigation of an accident, one of their "community caretaking functions."

Respondent then petitioned the Arizona Supreme Court for review. On January 21, 1997, the supreme court issued an opinion vacating the court of appeals' opinion. The supreme court held that this Court's cases discussing the police power to stop vehicles, detain, and question persons must "have required reasonable suspicion in connection with a crime that was about to be committed, or was being committed at the moment of the stop, or had already been committed." (citations omitted). The Supreme

Court went on to state: "However, under the current status of federal law and the sphere of protection granted individuals within their vehicles, the forced stop of an automobile without at least articulable suspicion of criminal activity is an unconstitutional seizure under the Fourth Amendment."

Facts of the Case

On April 9, 1994, Scottsdale Police Officer Robert DeHaven was patrolling the northern end of Scottsdale, in a "basically rural, more country-like area of the city." At about 1:25 a.m., he was dispatched to investigate a one-car roll-over accident on the side of the road near Pima Road and Dynamite Boulevard. As he and his partner pulled up, the fire department was just leaving. The fire department had searched the off-road desert area for signs of the driver but had found nothing.

Officer DeHaven and his partner resumed the search of the desert area, to ensure that no injured person was in the area. Officer DeHaven could find no footprints in the area, and ran the car's license plate and learned that it was registered to an address in Cave Creek, a nearby town. During this time, no more than two or three cars drove by the accident scene. The cars would slow down and gawk as they passed by the rolled-over car.

As Officer DeHaven was conducting his investigation, Respondent drove by the accident. He pulled over and came to almost a complete stop just in front of the rolled-over car. Officer DeHaven thought Respondent must be the driver of the rolled-over car, or that he had come to tell the police what had happened. But Respondent just as quickly sped away. Officer DeHaven got into his car and followed Respondent for about one-quarter to one-half miles from the accident scene, where Respondent pulled over in response to the flashing lights of Officer DeHaven's patrol car.

Respondent jumped out of his car and began walking toward Officer DeHaven on a diagonal, angling away from him and toward the street. Officer DeHaven asked Respondent what he was doing by the rolled-over car and "What was going on?" Respondent told Officer DeHaven that he stopped by the rolled-over car because he thought Officer DeHaven might have needed some help. Respondent also asked what had happened and if everyone was all right. Officer DeHaven eventually learned that the car Respondent was driving was stolen.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for a writ of certiorari because the Arizona Supreme Court has decided an important federal question in a way that conflicts with the decisions of this Court, of several federal circuit courts of appeals, and other states that recognize the community caretaking function of the police.

The Arizona Supreme Court's finding that the police must have a "founded suspicion of criminal activity" before they can ever stop an automobile is contrary to this Court's decision in *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973), and other federal and state cases, that recognize the police also have a "community caretaking function." The reasonable suspicion of criminal activity standard presupposes an investigative purpose by the detaining officer. *See, e.g.*, *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion) (defendant suspected of carrying drugs); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) (defendants suspected of being illegal aliens); *Terry v. Ohio*, 392 U.S. 1, 22–23 (1968) (defendants suspected of planning robbery).

Officer DeHaven stopped Respondent's car, not for any investigatory purpose, but to see if Respondent could help in the investigation of the roll-over accident. Officer DeHaven was exercising what this Court has termed

the "community caretaking function" of the police, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441.

In the course of exercising this noninvestigatory function, the police may seize a person for Fourth Amendment purposes in order to ensure the safety of the public and/or the individual, regardless of any suspected criminal activity. *See, e.g., United States v. King*, 990 F.2d 1552, 1561 (10th Cir. 1993) (police justified in approaching defendants' car and could have briefly detained them to inform them of hazardous conditions and to advise driver to stop honking horn); *United Stated v. Rideau*, 949 F.2d 718, 720 (5th Cir. 1991) (officers stopped defendant for his own safety and the safety of others after observing him standing in the middle of the road at night, dressed in dark clothes, and apparently intoxicated), *vacated on other grounds*, 969 F.2d 1572 (5th Cir.1992) (en banc) (agreeing with panel on this point); *United States v. Wallace*, 889 F.2d 580, 582 (5th Cir.1989) (officers detained defendant for his own safety after being informed that he possessed gun and had threatened suicide), *cert. denied*, 497 U.S. 1006 (1990). The fact that the officer may not suspect the individual of criminal activity does not render such a seizure unreasonable per se, because *Terry* only requires "specific and articulable facts

which . . . reasonably warrant [an] intrusion" into the individual's liberty. *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880. *See also Rideau*, 969 F.2d at 1574; *Wallace*, 889 F.2d at 582. *Cf. State v. Vistuba*, 840 P.2d 511, 514 (Kan. 1992) (safety reasons based on specific, articulable facts may justify vehicle stop); *State v. Marcello*, 599 A.2d 357, 358 (Vt. 1991) (same); *State v. Pinkham*, 565 A.2d 318, 319 (Me. 1989); *State v. Oxley*, 503 A.2d 756, 759 (N.H. 1989) (same).

In this case, Officer DeHaven was clearly exercising his "community caretaking function" when he stopped Respondent's car as part of his investigation of the roll-over accident. The investigation of automobile accidents is within the police officers' community caretaking function. *Cady*, 413 U.S. at 441. Officer DeHaven had been at the scene of a roll-over accident and had been searching the desert, for over 20 minutes, for some sign of the driver's whereabouts. Respondent's behavior at the scene led Officer DeHaven to believe that Respondent could be of some assistance in the investigation.

The government's interest in investigating accidents and ensuring public safety by assisting accident victims, while perhaps not as compelling as criminal investigation is a service we have come to expect from the police and sufficiently outweighs the relatively minor intrusions on

motorists. The Arizona Supreme Court's ruling, which ignores *Cady* and cases expounding on the community caretaking function, has the unwanted result of creating two classes of Fourth Amendment rights: one for pedestrians and another for motorists. Had Respondent been a pedestrian who exhibited as much interest in the accident, Officer DeHaven's stopping him and inquiring about what he knew or had seen would be acceptable. However, because Respondent was in a car, which Officer DeHaven had to stop by flashing his police lights, the Arizona Supreme Court improperly held, as a matter of federal constitutional law, that Officer DeHaven must have cause to believe Respondent was involved in a crime before he could stop Respondent and ask for his help.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioner respectfully request this Court to grant the petition for writ of certiorari.

Respectfully submitted,
GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section

CONSUELO M. OHANESIAN
Assistant Attorney General
(Counsel of Record)
Attorneys for PETITIONER

CRM95-0446/12809_1

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ARIZONA

EN BANC

STATE OF ARIZONA,	)	SUPREME COURT
	)	No. CR-96-0224-PR
Appellee,	)	
	)	Court of Appeals
vs.	)	No. 1 CA-CR 95-0282
	)	
DANIEL RICHCREEK,	)	Maricopa County
	)	No. CR 94-91260
Appellant.	)	
	)	Filed January 21, 1997

OPINION

Appeal from the Superior Court in Maricopa County

The Honorable Daniel A. Barker, Judge

REMANDED WITH INSTRUCTIONS

Opinion of the Court of Appeals, Division One
___ Ariz. ___, 924 P.2d 463 (1996)
VACATED

Grant Woods, Arizona Attorney General — Phoenix
By: Paul J. McMurdie
Consuelo M. Ohanesian
Attorneys for State of Arizona

Dean W. Trebesch, Maricopa County Public Defender — Phoenix
By: Lawrence S. Matthew
Attorneys for Daniel Richcreek

FELDMAN, Chief Justice

Daniel Richcreek (Defendant) appeals his conviction for the theft of an automobile. The sole issue before the court of appeals was whether the trial court erred when it refused to suppress evidence seized as a result of the stop of the vehicle Defendant was driving. The majority of the court of appeals affirmed. The dissenting judge concluded the evidence should have been suppressed. We agree with the dissent and reverse.

FACTS AND PROCEDURAL HISTORY

On April 9, 1994, Scottsdale Police Officer Robert DeHaven (DeHaven) investigated a one-car, roll-over accident that occurred in the far north side of the city after midnight. The accident was near the intersection of Dynamite Road and Pima Road, an area described as desert and more like "county" road. There was no driver at the scene when the police officers arrived, so they proceeded to search the area for any injured passengers and to investigate the accident. As they did so, two or three cars passed the scene. According to the officer, these cars slowed by 5 to 15 miles an hour from 50 miles an hour as they came to the scene then accelerated after they had passed. Defendant drove past, slowing almost to a stop, and pulling over to the side of the road as he did. He then quickly accelerated and left. This piqued DeHaven's curiosity, as he thought that Defendant might be the missing driver of the wrecked car or a relative or

friend of the driver returning to the scene. DeHaven, therefore, followed Defendant for a quarter to a half mile and pulled him over to inquire about the accident. Defendant was not suspected of criminal activity and was not observed violating any traffic laws.

After pulling over, Defendant got out of his car and "stood in the middle of the street." Instead of walking straight back to the officer, he moved "kind of towards" the officer but also "kind of towards the street." DeHaven thought he looked nervous and like he might run away. DeHaven then asked Defendant why he had pulled over at the accident scene, and Defendant said that he felt that perhaps the officers at the scene "needed some help and that was his only interest" in the wrecked car. The officer said Defendant seemed willing to talk about the accident under investigation but not about himself. The officer asked to see Defendant's driver's license and registration. Upon running a check on Defendant's car, DeHaven learned it was stolen and arrested Defendant.

Defendant moved to suppress all evidence against him, including DeHaven's report and the reports concerning the stolen car. The trial court denied his motion and found him guilty in a bench trial of one count of theft, a class 4, non-dangerous felony. Defendant received a suspended sentence with three years probation. A majority of the court of appeals affirmed the trial court's decision. *State v. Richcreek*, ___ Ariz. ___,

924 P.2d 463 (1996). We have jurisdiction pursuant to Arizona Rule of Criminal Procedure 31.19 and granted review to determine whether the trial court erred when it denied Defendant's motion to suppress evidence seized as a result of a stop made for investigation not related to suspected criminal activity. *See* Ariz. R. Crim. P. 31.19.

DISCUSSION

The court of appeals held the stop was reasonable, given the totality of the circumstances, as DeHaven had a "particularized and objective basis"—Defendant's driving behavior—for suspecting Defendant might have information relevant to the accident he was investigating. *See United States v. Rodriguez*, 976 F.2d 592, 594 (9th Cir. 1992), *modified*, 997 F.2d 1306 (9th Cir. 1993); *State v. Jarzab*, 123 Ariz. 308, 311, 599 P.2d 761, 764 (1979). We assume, but do not decide, that the officer could have inferred that Defendant was a witness or knew something about the accident that would justify police addressing questions to him. We question, however, whether on this basis the police could follow and stop Defendant's car and ask for registration and identification in order to ask about the accident when DeHaven had no articulable suspicions that Defendant had been or was involved in criminal or other activities beyond the accident. Thus, the stop and subsequent request for Defendant's

driver's license and car registration raise serious questions as to permissible search and seizure.

The law permitting police to stop and question citizens flows from *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), in which the United States Supreme Court found that a police officer's brief detention of a person to make reasonable inquiries was permissible under the Fourth Amendment so long as the officer had articulable suspicious concerning possible criminal activity. Likewise, the police may stop vehicles when there are objective facts available raising a suspicion of criminal activities, although the Fourth and Fourteenth Amendments may be more firmly implicated because stopping and detaining the passengers of an automobile constitutes a seizure. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396 (1979). Even though the purpose of the stop may be limited and the detention brief, the governmental interests behind the intrusion must be balanced against the individual's Fourth Amendment rights. *Id.* at 654, 99 S. Ct. at 1396.

The question raised in this case, then, is how much of an intrusion by police is permissible when the individual to be stopped is not suspected of being involved in criminal activity?[1] *Terry* and most of its progeny seem

---

1. We are not concerned here with either administrative stops or stops
(continued...)

to require that the police have a founded suspicion the person they are stopping is involved in criminal activity. *See Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 2641 (1979) (arrest under Texas law for failing to give name to police violated the Fourth Amendment because the officers lacked any reasonable suspicion to believe that defendant was engaged in or had engaged in criminal conduct). Again, this is particularly true with respect to automobile stops. *See United States v. Cortez*, which held that an automobile "investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be engaged in criminal activity." 449 U.S. 411, 417, 101 S. Ct. 690, 695 (1981).

This court has noted, however, that the officer need not be convinced a crime has or will be committed but, rather, that "[w]hen confronted with strange or unusual activities, a police officer, as the public's representative delegated with the responsibility of maintaining law and order, should satisfy himself as to the innocence of the activity by all reasonable, lawful means." *Jarzab*, 123 Ariz. at 311, 599 P.2d at 764. In *Jarzab*, decided before *Cortez* and by a sharply divided court, the majority noted that suspicion of criminal activity was not required as "an essential ingredient for investigative stops, detention and questioning." *Id.* at 310, 599 P.2d

---

1. (...continued)
as result of civil traffic violations.

at 673. Although the result in *Jarzab* was quite correct under the facts of that case, we believe the quoted language goes too far and conflicts with both earlier and later rulings of this court and subsequent cases of the U.S. Supreme Court.

In *Jarzab*, a police officer noticed a new Chevy Blazer in the desert about one quarter of a mile off Interstate 10. *Id.* at 309, 599 P.2d at 762. The time was about 1:40 a.m. and the truck appeared unoccupied. When the officer approached the vehicle to investigate, a man stepped out from behind some bushes. He told the officer that the truck was his and that he had stopped to relieve himself. The officer noticed that the man was young and smelled of alcohol and asked to see his driver's license, in order to determine if he was of age. When the man opened the door to the truck, the interior lights illuminated a bag of marijuana on the console. *Id.* The court found that the officers actions were not unreasonable, either when he stopped to investigate a truck seemingly abandoned off-road in the desert, or when he asked for the driver's license, because "[t]he scope of the intrusion was fleeting and minimal and reasonably related to the circumstances justifying it." *Id.* at 311, 599 P.2d at 764.

It was arguably not unreasonable for the officer to verify ownership of the vehicle seemingly abandoned in the desert before allowing Jarzab to

drive the vehicle away. The officer stopped no one and detained no one. Furthermore, the stop in *Jarzab* would also be allowable because a police officer has a duty to investigate and remove abandoned automobiles under A.R.S. § 28–4834. Thus, his initial contact with the defendant was permissible. After speaking with the driver and noticing the odor of alcohol, the police officer then had reasonable suspicion to request his driver's license to determine if he was age. Therefore, the court in *Jarzab* could have reached the same conclusion without broadening the stop and frisk power allowed under *Terry*.

But the facts of *Jarzab* are much different from those in the present case. Defendant did not claim ownership of a seemingly abandoned vehicle. There was no reason to believe he was engaged in criminal activity and yet he was followed, required to pull over and to produce his papers. We do not believe the Fourth Amendment permits this. The power of the police has been restrained because stopping and detaining an automobile and its passengers is a seizure within the meaning of the Fourth Amendment and requires a strong governmental interest to justify the intrusion. *Prouse*, 440 U.S. at 653, 99 S. Ct. at 1396; *Cortez*, 449 U.S. at 417, 101 S. Ct. at 695. Thus, cases discussing the police power to stop vehicles, detain, and question persons have required reasonable suspicion in connection with

a crime that was about to be committed, *e.g.*, *Terry*, or was being committed at the moment of the stop, *e.g.*, *Cortez* and *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921 (1972), or had already been committed, *e.g.*, *United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675 (1985).

When, as in *Jarzab*, the stop of an automobile is not involved, the Supreme Court has held that police officers may approach individuals at random in public places to ask them questions as long as a reasonable person would understand that he or she could refuse to answer. *Florida v. Bostick*, 501 U.S. 428, 431, 111 S. Ct. 2382, 2384 (1991); *see also Florida v. Rodriguez*, 469 U.S. 1, 105 S. Ct. 308 (1984); *INS v. Delgado*, 466 U.S. 210, 104 S. Ct. 1758 (1984); *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319 (1983).

We believe, therefore, that the correct rule for automobile stop cases is contained in Arizona cases decided both before and after *Jarzab*. Random vehicle stops for inspection, when not based on reasonable suspicion of criminal activity, constitute an impermissible seizure under the Fourth Amendment. *State v. Ochoa*, 112 Ariz. 582, 544 P.2d 1097 (1976). "Stop of an automobile is permitted when based on a reasonable suspicion that the [driver or passenger was] engaged in criminal activity." *State v. Gonzalez-Gutierrez*, 231 Ariz. Adv. Rep. 6, 8 (1996) (quoting *State v.*

Maldonado, 164 Ariz. 471, 474, 793 P.2d 1138, 1141 (App. 1990)). Hunches, intuition, and "unparticularized suspicion" are not enough. *State v. Graciano*, 134 Ariz. 35, 37, 653 P.2d 683, 685 (1982). This rule conforms to the language and the principles expressed by the U.S. Supreme Court in *Brown*, *Cortez*, and a number of other cases. Insofar as the language in *Jarzab* would permit pursuit and stop, questioning and detention of auto drivers and passengers without a founded suspicion of criminal activity, the case is disapproved.

It may be argued that there is something of an inconsistency in this holding. Specifically, under *Terry*, the stop of a pedestrian to ask questions, on any topic, is permissible. *See Terry*, 392 U.S. at 34, 88 S. Ct. at 1886. White, J., concurring ("There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way."). Likewise, the police have been authorized to question passengers on busses and in airports. *Bostick*, 501 U.S. at 433, 111 S. Ct. at 2386 (random questioning of bus passenger during scheduled stop, followed by consensual search); *see also Rodriguez*, 469 U.S. 1, 105 S. Ct. 308; *Delgado*, 466 U.S. 210, 104 S. Ct. 1758; *Royer*, 460 U.S. 491, 103 S. Ct.

1319. However, under the current status of federal law and the sphere of protection granted individuals within their vehicles, the forced stop of an automobile without at least articulable suspicion of criminal activity is an unconstitutional seizure under the Fourth Amendment.[2]

We believe, moreover, that the rule is sensible and pragmatically required by constitutional principle. Forced stops of an automobile are much different and more intrusive than simply addressing a question to a pedestrian encountered on the street or public conveyance. Such encounters in public places, including questions addressed to the persons encountered, are permitted "as long as police do not convey a message that compliance with their requests is required." *Bostick*, 501 U.S. at 433, 111 S. Ct. at 2386. When the blue lights on the patrol car begin to flash, the person being followed does not feel free to ignore them and drive on. The idea that police may follow and pursue automobiles driven and occupied by persons not suspected of any criminal activity and may pull them over,

---

2. We distinguish this case from the recent decision in *Ohio v. Robinette*, U.S. Supreme Court, No. 95-89, in which the Court held that a consensual search unrelated to the initial stop and after the suspect was free to leave was permissible, despite the officer's failure to inform the suspect of his freedom to leave. In the instant case, there was no reasonable suspicion of criminal activity or traffic violation, whereas Robinette had been observed violating a traffic law which led to his stop.

detain them, and question them opens up vistas which we think go far beyond what is permitted by the Fourth Amendment.

CONCLUSION

The officer's pursuit, stop, detention, and request for Defendant's identification papers were impermissible under the Fourth Amendment. Without a founded suspicion of criminal activity, evidence derived from an illegal search or seizure is "fruit of the poisonous tree" and should be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407 (1963). Thus, we vacate the court of appeals' decision and reverse the judgment of the trial court. The court should have granted the motion to suppress. The case is remanded for proceedings consistent with this opinion.

/s/
STANLEY G. FELDMAN, Justice

CONCURRING:

/s/
THOMAS A. ZLAKET, Chief Justice

/s/
CHARLES E. JONES, Vice Chief Justice

/s/
JAMES MOELLER, Justice

/s/
FREDERICK J. MARTONE, Justice

APPENDIX B

STATE OF ARIZONA, Appellee, vs. DANIEL RICHCREEK, Appellant.	)	No. 1 CA-CR 95-0282 Court of Appeals of Arizona Division 1, Department E. Feb. 29, 1996. Review Granted Sept. 24, 1996.

Defendant was convicted in the Superior Court, Maricopa County, Cause No. CR 94-91260, Daniel A. Barker, J., of theft. Defendant appealed. The Court of Appeals, Gerber, J., held that officer was justified in making investigatory stop of defendant after defendant nearly stopped at accident scene officer was investigating, then sped from scene.

Affirmed.

Voss, J., dissented and filed a separate opinion.

Grant Woods, Attorney General by Paul J. McMurdie, Chief Counsel, Criminal Appeals Section, and Consuelo M. Ohanesian, Assistant Attorney General, Phoenix, for Appellee.

Dean W. Trebesch, Maricopa County Public Defender by Lawrence S. Matthew, Deputy Public Defender, Phoenix, for Appellant.

OPINION

GERBER, Judge.

Appellant Daniel Charles Richcreek (Richcreek) appeals his conviction for one count of theft, a class 4 nondangerous felony. The sole issue before us is whether the trial court erred when it refused to suppress all evidence against him. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

According to the record, the relevant facts are as follows: On April 9, 1994, Scottsdale Police Officer Robert DeHaven (DeHaven) investigated an abandoned, recently-wrecked automobile. DeHaven had over eighteen years of law enforcement experience. During his investigation at the site of the abandoned vehicle, he saw a car slow to a near stop ahead of the accident site, pull slightly to the side of the road and then speed away.

DeHaven later testified that "[a]t first I thought this is the driver or a relative or somebody coming back to tell us what's going on." He stopped the vehicle and Richcreek exited and began asking DeHaven questions about the accident. In response to DeHaven's request for identification, Richcreek produced a driver's license. DeHaven asked for the vehicle's registration and discovered that the car had been stolen.

Richcreek moved to suppress all evidence against him, consisting of DeHaven's report, a stolen vehicle recovery supplement and copies of the

arrest/booking and vehicle recovery slips. The trial court denied his motion. After a bench trial, the court found him guilty based on these documents, suspended his sentence and placed him on probation for three years. He timely appealed. This court has jurisdiction pursuant to Arizona Revised Statutes Annotated (A.R.S.) sections 12-120.21(A)(1), 13-4031 and 13-4033(A).

ISSUE ON APPEAL

The sole issue before us is whether the trial court erred when it refused to suppress all evidence against Richcreek.

ANALYSIS

Richcreek argues that the stop and subsequent seizure of his car was illegal because DeHaven did not have reasonable suspicion of wrongful activity. He urges us to follow *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621 (1981), where the United States Supreme Court held that reasonable suspicion requires articulable facts coupled with reasonable inferences of criminal activity. *See also State v. Ochoa*, 112 Ariz. 582, 584, 544 P.2d 1097, 1099 (1976). Richcreek contends that he was merely "rubbernecking," which is not suspicious or criminal behavior. *See United States v. Garcia-Camacho*, 53 F.3d 244, 247

(9th Cir. 1995). *See also United States v. Robert L.*, 874 F.2d 701, 704 (9th Cir. 1989).

The state responds by saying that DeHaven acted reasonably. It urges us to follow *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884–85, 20 L. Ed. 2d 889 (1968), where the United States Supreme Court held that a police officer may make reasonable inquiries when the officer suspects criminal activity. The state contends that DeHaven's stop and subsequent seizure of Richcreek's vehicle was reasonable given the totality of the circumstances. *See Cortez*, 449 U.S. at 417–18, 101 S. Ct. at 69–95. It alleges that DeHaven observed behavior which led him, as an experienced police officer, to suspect criminal activity.

We agree with the state for two distinct reasons. DeHaven had "a particularized and objective basis" for suspecting that Richcreek might have information relevant to the accident he was investigating. *See United States v. Rodriguez*, 976 F.2d 592, 594 (9th Cir. 1992), *modified*, 997 F.2d 1306 (9th Cir. 1993). At a minimum, A.R.S. section 28–667 requires police to investigate traffic accidents and interview potential witnesses, irrespective of the officer's independent suspicion of crime. Arizona law prohibits the abandoning of a vehicle; a companion statute provides that officers investigate such vehicles. A.R.S. § 28–1401.01(A) and (E). The

occurrence of the accident, the abandoned vehicle and Richcreek's proximity to it constitute all the reason needed for the investigating officer to seek information from him about the abandoned vehicle. *See South Dakota v. Opperman*, 428 U.S. 364, 375, 96 S. Ct. 3092, 3100, 49 L. Ed. 2d 1000 (1976) (affirming validity of seizure pursuant to abandoned vehicle report based on noncriminal purpose of police activity). *See also Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 2528, 37 L. Ed. 2d 706 (1973) ("Local police officers . . . frequently investigate vehicle accidents in which there is no claim of criminal liability . . . and engage in what may be described as community caretaking functions;" seizure pursuant to such a "community caretaking function" in wake of automobile accident given reduced scrutiny under Fourth Amendment as compared to seizure in criminal investigation).

In addition to the accident investigation justification, the facts also support a stop based on suspicion of a crime. The abandoned, wrecked vehicle on a lonely stretch of desert highway was made all the more suspicious by Richcreek's driving behavior, including his flight from the scene. In *State v. Jarzab*, 123 Ariz. 308, 311, 599 P.2d 761, 764 (1979), our Supreme Court pointedly held that "an officer, when he commences an investigation, need [not] be convinced that 'criminal activity is afoot.'" The

officer had reasonable cause to detain Richcreek for investigation based on the near-stop of his vehicle at the scene of the accident and its speeding away. DeHaven initially stopped him merely to obtain more information, not to arrest him. *See Adams v. Williams*, 407 U.S. 143, 145–46, 92 S. Ct. 1921, 1922–23, 32 L. Ed. 2d 612 (1972).

The facts in this case differ from those in both *Garcia-Camacho* and *Robert L.* and from the Arizona case of *State v. Weitman*, 22 Ariz. App. 162, 525 P.2d 293 (1974), cited by the dissent. In those cases, officers stopped individuals without connection to activities under investigation, based on racial and often stereotypical prejudgments of criminal behavior. *Weitman*, 22 Ariz. App. at 162–63, 525 P.2d at 293–94; *Garcia-Camacho*, 53 F.3d at 245; *Robert L.*, 874 F.2d at 702. Nothing here indicates that Officer DeHaven based his suspicion of Richcreek on these types of assumptions. He detained Richcreek because he either might know something about the accident or be criminally involved. The discovery that Richcreek's car was stolen was incidental. Given these two separate justifications for the stop, the trial court properly denied Richcreek's motion to suppress the evidence against him.

CONCLUSION

We have reviewed the record for fundamental error and have found none. For the reasons given above, we affirm Richcreek's conviction and sentence.

/s/
Rudolph J. Gerber, Presiding Judge
Department E

CONCURRING:

/s/
Jon W. Thompson, Judge

VOSS, Judge, dissenting.

By all appearances, this was an accident scene on a rural stretch of highway; there was an overturned vehicle off the side of the road and two police vehicles. That a motorist slowed, pulled slightly to the side of the road, and then accelerated and left the scene is not unusual. Unfortunately, "rubbernecking" is a common occurrence and tends to be more indicative of curiosity or good samaritanism than criminal activity.

Because I do not believe that the stop of Richcreek's vehicle was based on a reasonable suspicion of criminal activity, I respectfully dissent.

THE ACCIDENT INVESTIGATION JUSTIFICATION

The majority states that DeHaven had a reasonable suspicion that Richcreek might have information relevant to the accident he was investigating and cites A.R.S. §§ 28-667 and 28-1401.01 to support the stop. First, I disagree with the majority's statement that "[t]he occurrence of the accident, the abandoned vehicle and Richcreek's proximity to it constitute all the reason needed" for the officer to stop Richcreek. Majority Opinion at ___, 924 P.2d at 465. There is absolutely no evidence to connect Richcreek with the overturned vehicle. The majority's holding would allow an officer investigating any accident to stop any vehicle that slowed at an accident scene and caught the officer's eye. This rationale

clearly goes beyond the type of search allowed under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Second, A.R.S. §§ 28-667 and 28-1401.01 alone do not authorize officers to stop motorists to ask for registration and a driver's license. The statutes merely require officers to investigate the scene, and after completion of that investigation, to write a report. Although the majority argues that these sections provide an independent basis to support a stop, the statutes do not support that argument;[1] and neither the state nor the

---

1. The relevant portion of A.R.S. § 28-667 states:

A. Every law enforcement officer . . . who . . . investigates a motor vehicle accident resulting in bodily injury or death or damage to the property of any person in excess of one thousand dollars or the issuance of a citation, either at the time of and at the scene of the accident or thereafter by interviewing participants or witnesses, shall . . . complete a written report of the accident.

A.R.S. § 28-1401.01(A) and (E) provide:

A. No person shall abandon a vehicle upon any street or highway or on any other public land, federal land, state trust land, national forest, state park land, bureau of land management land or private property.

E. An officer employed by a public agency or political subdivision who has removed an abandoned vehicle pursuant to this section or has removed or caused to be removed a vehicle pursuant to § 28-872 shall inspect the vehicle and shall complete the vehicle identification form prescribed or approved by the assistant director. The agency or political subdivision shall make inquiry to determine whether the abandoned vehicle is a stolen abandoned vehicle.

arresting officer made that argument.

CRIME SUSPICION JUSTIFICATION

The majority also states that Richcreek's conduct supports a reasonable suspicion that Richcreek was involved with criminal activity. This reasonable suspicion is based on Richcreek's near-stop, his pulling slightly to the side of the road, and his accelerating away from the scene. These facts are not sufficient to support a reasonable suspicion that Richcreek was involved in criminal activity.

First, the record does not support the majority's characterization of Richcreek's conduct. At different times, DeHaven described Richcreek as having "sped away," "suddenly took off," "suddenly accelerated," "accelerated," and "drove on." However, DeHaven never suggested that the speed of Richcreek's vehicle exceeded the speed limit or alone provided justification for the stop. The majority also states that DeHaven's reasonable suspicion was partially based on Richcreek's "flight from the scene." Majority Opinion at ___, 924 P.2d at 465. The record simply does not support this characterization. The record contains no evidence that Richcreek's departure from the accident scene was in any way motivated by a desire to avoid contact with the police. Actually, the record provides evidence tending to prohibit such a conclusion. DeHaven testified that there were two police vehicles at the scene of the rollover accident. If Richcreek

desired to avoid contact with the officer, it makes no sense that he would have slowed to a near-stop next to two marked police vehicles in the first place. The majority's recitation of the facts creates the unjustified impression that Richcreek, upon sight of the police officer, fled to avoid detention. The arresting officer never suggested this and the record does not otherwise support such an impression.

Additionally, DeHaven's rationale for suspecting Richcreek is not sufficient to distinguish potential criminals from countless law-abiding citizens. The objective and articulable facts advanced to support a reasonable suspicion must not be likely to draw large numbers of innocent citizens into the category of persons subject to stops. *Reid v. Georgia*, 448 U.S. 438, 441, 100 S. Ct. 2752, 2754, 65 L. Ed. 2d 890 (1980); *Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 2641, 61 L. Ed. 2d 357 (1979); *United States v. Rodriguez*, 976 F.2d 592, 596 (9th Cir. 1992), *modified by*, 997 F.2d 1306 (9th Cir. 1993); *State v. Master*, 127 Ariz. 210, 211, 619 P.2d 482, 483 (1980). The factors enumerated by the majority are insufficient to distinguish potential criminals from countless law-abiding drivers.

The majority cites to *Adams v. Williams*, 407 U.S. 143, 145–46, 92 S. Ct. 1921, 1922–23, 32 L. Ed. 2d 612 (1972), to say that DeHaven

could stop Richcreek "merely to obtain more information." Majority Opinion at ___, 924 P.2d at 465. I do not believe Williams can be read so broadly. In *Williams*, the Supreme Court stated that a police officer may "approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." 407 U.S. at 145, 92 S. Ct. at 1923 (citation omitted). While *Williams* does approve stops for purposes of obtaining information, the stop must be based on a reasonable suspicion that the person is engaged in possibly criminal behavior. The Fourth Amendment requires more than mere information regarding an event, it requires a nexus to some criminal activity. *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 694-95, 66 L. Ed.2d 621 (1981). Such a nexus has not been made in this case.

The record is devoid of anything that would lead reasonable people to suspect that either Richcreek or the overturned vehicle was connected with any illegal activity. Officer DeHaven was not investigating a suspected crime scene. Instead, he was investigating a one-car rollover accident. DeHaven does not state what crime he suspected Richcreek of committing. DeHaven stated simply that "something was afoot here involving this vehicle that I had that was not correct. . . ." This statement fails to rise to the level of an objective, articulable suspicion that there has been a violation of the law and that Richcreek was involved.

Finally, the majority's holding is contrary to the controlling case law in this jurisdiction. In *State v. Weitman*, 22 Ariz. App. 162, 525 P.2d 293 (1974), this court upheld suppression of evidence seized as a result of a stop comparable to the stop in the present case. In *Weitman*, defendant's vehicle was stopped because it was traveling in an "unusual" manner in light of the circumstances. *Id.* at 163, 525 P.2d at 294. A police officer testified that the vehicle was stopped because it drove very slowly past a tavern, which the officer found to be unusual in consideration of "who was in the vehicle, who was in front of [the tavern] or what they might have been looking at, [and] the traffic situation at the time." *Id.* This court held that those facts did not warrant a reasonable suspicion that illegal activity was afoot. *Id.* at 164, 525 P.2d at 295.

The conduct of Richcreek in this case is no more supportive of reasonable suspicion than the conduct of the driver in *Weitman*. In each case, the state is attempting to establish a reasonable suspicion based upon nothing more than the driver of a car lawfully slowing down, observing an area, and returning to normal speed. In neither case, were there any facts to connect the driver to any illegal behavior. Stops were made in each case based only upon the officer's suspicion that something was unusual. Stops

based upon this type of unsupported hunch fall below the standard articulated in *Terry*, 392 U.S. at 22, 88 S. Ct. at 1880–81.

The majority also fails to adequately distinguish the facts of this case from two Ninth Circuit cases cited by Richcreek. In both *United States v. Garcia-Camacho*, 53 F.3d 244 (9th Cir. 1995), and *United States v. Robert L.*, 874 F.2d 701 (9th Cir. 1989), the Ninth Circuit Court of Appeals held that police lacked reasonable suspicion to detain motorists based on facts similar to this case.

In *Garcia-Camacho*, border patrol agents stopped a motorist based on factors including: the occupants of the vehicle looked straight ahead when passing the agents, did not acknowledge the agents, the truck was the type that could be used for smuggling, the truck appeared heavily ladened, the truck accelerated and made a lane change near the agents, and the occupants turned around and looked at the agents with a surprised look. 53 F.3d at 246.

Similar factors were advanced to support a stop in *Robert L.*: the driver's eye contact with police, driver left an accident at a faster pace than other vehicles, the size of the vehicle's trunk, the youthful appearance of the driver, and that a juvenile was driving during school hours. 874 F.2d at 703.

In both cases the Ninth Circuit held that the enumerated factors were insufficient to support a reasonable suspicion of criminal activity. 53 F.3d at 249, 874 F.2d at 705. I believe the facts of the present case are even less supportive of a reasonable suspicion than those enumerated in either *Garcia-Camacho* or *Robert L.* Nowhere did Officer DeHaven suggest that Richcreek met any profile of certain types of criminals. Officer DeHaven's decision to stop Richcreek amounted to little more than his hunch that something "was not correct." The *Terry* court specifically stated that it had refused to sanction stops "based on nothing more substantial than inarticulate hunches." 392 U.S. at 22, 88 S. Ct. at 1880.

CONCLUSION

The stop of Richcreek was not based on a reasonable suspicion of criminal activity. The stop was not justified by either the accident investigation or the suspicion of a crime justifications cited by the majority. The conduct cited by the majority is insufficient to provide a "particularized and objective basis" for concluding that Richcreek either had information related to the accident scene or was engaged in criminal activity.

I, therefore, respectfully dissent.

/s/
Edward C. Voss, Judge

APPENDIX C

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	
	)	
Appellee,	)	No. 1 CA-CR 95-0282
	)	Department E
vs.	)	
	)	O P I N I O N
DANIEL RICHCREEK,	)	
	)	
Appellant.	)	
	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR 94-91260

The Honorable Daniel A. Barker, Judge

AFFIRMED

Grant Woods, Attorney General
by Paul J. McMurdie, Chief Counsel, Criminal Appeals Section
and Consuelo M. Ohanesian, Assistant Attorney General
Attorneys for Appellee — Phoenix

Dean W. Trebesch, Maricopa County Public Defender
by Lawrence S. Matthew, Deputy Public Defender
Attorneys for Appellant — Phoenix

G E R B E R, Judge

Appellant Daniel Charles Richcreek (Richcreek) appeals his conviction for one count of theft, a class 4 nondangerous felony. The sole issue before us is whether the trial court erred when it refused to suppress all evidence against him. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

According to the record, the relevant facts are as follows: On April 9, 1994, Scottsdale Police Officer Robert DeHaven (DeHaven) investigated an abandoned, recently-wrecked automobile. DeHaven had over eighteen years of law enforcement experience. During his investigation at the site of the abandoned vehicle, he saw a car slow to a near stop ahead of the accident site, pull slightly to the side of the road and then speed away.

DeHaven later testified that "[a]t first I thought this is the driver or a relative or somebody coming back to tell us what's going on." He stopped the vehicle and Richcreek exited and began asking DeHaven questions about the accident. In response to DeHaven's request for identification, Richcreek produced a driver's license. DeHaven asked for the vehicle's registration and discovered that the car had been stolen.

Richcreek moved to suppress all evidence against him, consisting of DeHaven's report, a stolen vehicle recovery supplement and copies of the arrest/booking and vehicle recovery slips. The trial court denied his

motion. After a bench trial, the court found him guilty based on these documents, suspended his sentence and placed him on probation for three years. He timely appealed. This court has jurisdiction pursuant to Arizona Revised Statutes Annotated (A.R.S.) sections 12–120.21(A)(1), 13–4031 and 13–4033(A).

ISSUE ON APPEAL

The sole issue before us is whether the trial court erred when it refused to suppress all evidence against Richcreek.

ANALYSIS

Richcreek argues that the stop and subsequent seizure of his car was illegal because DeHaven did not have reasonable suspicion of wrongful activity. He urges us to follow *United States v. Cortez*, 449 U.S. 411, 418 (1981), where the United States Supreme Court held that reasonable suspicion requires articulable facts coupled with reasonable inferences of criminal activity. *See also State v. Ochoa*, 112 Ariz. 582, 584, 544 P.2d 1097, 1099 (1976). Richcreek contends that he was merely "rubbernecking," which is not suspicious or criminal behavior. *See United States v. Garcia-Camacho*, 53 F.3d 244, 247 (9th Cir. 1995). *See also United States v. Robert L.*, 874 F.2d 701, 704 (9th Cir. 1989).

The state responds by saying that DeHaven acted reasonably. It urges us to follow *Terry v. Ohio*, 392 U.S. 1, 30 (1968), where the United States Supreme Court held that a police officer may make reasonable inquiries when the officer suspects criminal activity. The state contends that DeHaven's stop and subsequent seizure of Richcreek's vehicle was reasonable given the totality of the circumstances. *See Cortez*, 499 U.S. at 417–18. It alleges that DeHaven observed behavior which led him, as an experienced police officer, to suspect criminal activity.

We agree with the state for two distinct reasons. DeHaven had "a particularized and objective basis" for suspecting that Richcreek might have information relevant to the accident he was investigating. *See United States v. Rodriguez*, 976 F.2d 592, 594 (9th Cir. 1992), *modified*, 997 F.2d 1306 (9th Cir. 1993). At a minimum, A.R.S. section 28–667 requires police to investigate traffic accidents and interview potential witnesses, irrespective of the officer's independent suspicion of crime. Arizona law prohibits the abandoning of a vehicle; a companion statute provides that officers investigate such vehicles. A.R.S. § 28–1401.01(A) and (E). The occurrence of the accident, the abandoned vehicle and Richcreek's proximity to it constitute all the reason needed for the investigating officer to seek information from him about the abandoned vehicle. *See South*

Dakota v. Opperman, 428 U.S. 364, 375 (1976) (affirming validity of seizure pursuant to abandoned vehicle report based on noncriminal purpose of police activity). *See also Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) ("Local police officers . . . frequently investigate vehicle accidents in which there is no claim of criminal liability . . . and engage in what may be described as community caretaking functions;" seizure pursuant to such a "community caretaking function" in wake of automobile accident given reduced scrutiny under Fourth Amendment as compared to seizure in criminal investigation).

In addition to the accident investigation justification, the facts also support a stop based on suspicion of a crime. The abandoned, wrecked vehicle on a lonely stretch of desert highway was made all the more suspicious by Richcreek's driving behavior, including his flight from the scene. In *State v. Jarzab*, 123 Ariz. 308, 311, 599 P.2d 761, 764 (1979), our Supreme Court pointedly held that "an officer, when he commences an investigation, need [not] be convinced that 'criminal activity is afoot.'" The officer had reasonable cause to detain Richcreek for investigation based on the near-stop of his vehicle at the scene of the accident and its speeding away. DeHaven initially stopped him merely to obtain more information, not to arrest him. *See Adams v. Williams*, 407 U.S. 143, 145–46 (1972).

The facts in this case differ from those in both *Garcia Camacho* and *Robert L.* and from the Arizona case of *State v. Weitman*, 22 Ariz. App. 162, 525 P.2d 293 (1974), cited by the dissent. In those cases, officers stopped individuals without connection to activities under investigation, based on racial and often stereotypical prejudgments of criminal behavior. *Weitman*, 22 Ariz. App. at 162–63, 525 P.2d at 293–94; *Garcia-Camacho*, 53 F.3d at 245; *Robert L.*, 874 F.2d at 702. Nothing here indicates that Officer DeHaven based his suspicion of Richcreek on these types of assumptions. He detained Richcreek because he either might know something about the accident or be criminally involved. The discovery that Richcreek's car was stolen was incidental. Given these two separate justifications for the stop, the trial court properly denied Richcreek's motion to suppress the evidence against him.

CONCLUSION

We have reviewed the record for fundamental error and have found none. For the reasons given above, we affirm Richcreek's conviction and sentence.

/s/
Rudolph J. Gerber, Presiding Judge
Department E

CONCURRING:

/s/
Jon W. Thompson, Judge

V O S S, Judge, dissenting

By all appearances, this was an accident scene on a rural stretch of highway; there was an overturned vehicle off the side of the road and two police vehicles. That a motorist slowed, pulled slightly to the side of the road, and then accelerated and left the scene is not unusual. Unfortunately, "rubbernecking" is a common occurrence and tends to be more indicative of curiosity or good samaritanism than criminal activity.

Because I do not believe that the stop of Richcreek's vehicle was based on a reasonable suspicion of criminal activity, I respectfully dissent.

THE ACCIDENT INVESTIGATION JUSTIFICATION

The majority states that DeHaven had a reasonable suspicion that Richcreek might have information relevant to the accident he was investigating and cites A.R.S. §§ 28-667 and 28-1401.01 to support the stop. First, I disagree with the majority's statement that "[t]he occurrence of the accident, the abandoned vehicle and Richcreek's proximity to it constitute all the reason needed" for the officer to stop Richcreek. Majority Opinion at 4. There is absolutely no evidence to connect Richcreek with the overturned vehicle. The majority's holding would allow an officer investigating any accident to stop any vehicle that slowed at an accident scene and caught the officer's eye. This rationale clearly goes beyond the type of search allowed under *Terry v. Ohio*, 392 U.S. 1 (1968).

Second, A.R.S. §§ 28-667 and 28-1401.01 alone do not authorize officers to stop motorists to ask for registration and a driver's license. The statutes merely require officers to investigate the scene, and after completion of that investigation, to write a report. Although the majority argues that these sections provide an independent basis to support a stop, the statutes do not support that argument;[1] and neither the state nor the arresting officer made that argument.

---

1. The relevant portion of A.R.S. § 28-667 states:

> A. Every law enforcement officer . . . who . . . investigates a motor vehicle accident resulting in bodily injury or death or damage to the property of any person in excess of one thousand dollars or the issuance of a citation, either at the time of and at the scene of the accident or thereafter by interviewing participants or witnesses, shall . . . complete a written report of the accident.

A.R.S. § 28-1401.01(A) and (E) provide:

> A. No person shall abandon a vehicle upon any street or highway or on any other public land, federal land, state trust land, national forest, state park land, bureau of land management land or private property.
>
> E. An officer employed by a public agency or political subdivision who has removed an abandoned vehicle pursuant to this section or has removed or caused to be removed a vehicle pursuant to § 28-872 shall inspect the vehicle and shall complete the vehicle identification form prescribed or approved by the assistant director. The agency or political subdivision shall make inquiry to determine whether the abandoned vehicle is a stolen abandoned vehicle.

CRIME SUSPICION JUSTIFICATION

The majority also states that Richcreek's conduct supports a reasonable suspicion that Richcreek was involved with criminal activity. This reasonable suspicion is based on Richcreek's near-stop, his pulling slightly to the side of the road, and his accelerating away from the scene. These facts are not sufficient to support a reasonable suspicion that Richcreek was involved in criminal activity.

First, the record does not support the majority's characterization of Richcreek's conduct. At different times, DeHaven described Richcreek as having "sped away," "suddenly took off," "suddenly accelerated," "accelerated," and "drove on." However, DeHaven never suggested that the speed of Richcreek's vehicle exceeded the speed limit or alone provided justification for the stop. The majority also states that DeHaven's reasonable suspicion was partially based on Richcreek's "flight from the scene." Majority Opinion at 4. The record simply does not support this characterization. The record contains no evidence that Richcreek's departure from the accident scene was in any way motivated by a desire to avoid contact with the police. Actually, the record provides evidence tending to prohibit such a conclusion. DeHaven testified that there were two police vehicles at the scene of the rollover accident. If Richcreek desired to avoid contact with the officer, it makes no sense that he would

have slowed to a near-stop next to two marked police vehicles in the first place. The majority's recitation of the facts creates the unjustified impression that Richcreek, upon sight of the police officer, fled to avoid detention. The arresting officer never suggested this and the record does not otherwise support such an impression.

Additionally, DeHaven's rationale for suspecting Richcreek is not sufficient to distinguish potential criminals from countless law-abiding citizens. The objective and articulable facts advanced to support a reasonable suspicion must not be likely to draw large numbers of innocent citizens into the category of persons subject to stops. *Reid v. Georgia*, 448 U.S. 438, 441 (1980); *Brown v. Texas*, 443 U.S. 47, 52 (1979); *United States v. Rodriguez*, 976 F.2d 592, 596 (9th Cir. 1992), *modified by*, 997 F.2d 1306 (9th Cir. 1993); *State v. Master*, 127 Ariz. 210, 211, 619 P.2d 482, 483 (1980). The factors enumerated by the majority are insufficient to distinguish potential criminals from countless law-abiding drivers.

The majority cites to *Adams v. Williams*, 407 U.S. 143, 145–46 (1972), to say that DeHaven could stop Richcreek "merely to obtain more information." Majority Opinion at 5. I do not believe *Williams* can be read so broadly. In *Williams*, the Supreme Court stated that a police officer may

"approach a person for purposes of investigating possibly criminal bahvior even though there is no probable cause to make an arrest." 407 U.S. at 145 (citation omitted). While *Williams* does approve stops for purposes of obtaining information, the stop must be based on a reasonable suspicion that the person is engaged in *possibly criminal behavior*. The Fourth Amendment requires more than mere information regarding an event, it requires a nexus to some criminal activity. *United States v. Cortez*, 449 U.S. 411, 417 (1981). Such a nexus has not been made in this case.

The record is devoid of anything that would lead reasonable people to suspect that either Richcreek or the overturned vehicle was connected with any illegal activity. Officer DeHaven was not investigating a suspected crime scene. Instead, he was investigating a one-car rollover accident. DeHaven does not state what crime he suspected Richcreek of committing. DeHaven stated simply that "somegthing was afoot here involving this vehicle that I had that was not correct . . . ." This statement fails to rise to the level of an objective, articulable suspicion that there has been a violation of the law and that Richcreek was involved.

Finally, the majority's holding is contrary to the controlling case law in this jurisdiction. In *State v. Weitman*, 2 Ariz. App. 162, 525 P.2d 293 (1974), this court upheld suppression of evidence seized as a result of a stop comparable to the stop in the present case. In *Weitman*, defendant's

vehicle was stoppped because it was travelling in an "unusual" manner in light of the circumstances. *Id.* at 163, 525 P.2d at 294. A police officer testified that the vehicle was stopped because it drove very slowly past a tavern, which the officer found to be unusual in consideration of "who was in the vehicle, who was in front of [the tavern] or what they might have been looking at, [and] the traffic situation at the time." *Id.* This court held that those facts did not warrant a reasonable suspicion that illegal activity was afoot. *Id.* at 164, 525 P.2d at 295.

The conduct of Richcreek in this case is no more supportive of reasonable suspicion than the conduct of the driver in *Weitman*. In each case, the state is attempting to establish a reasonable suspicion based upon nothing more than the driver of a car lawfully slowing down, observing an area, and returning to normal speed. In neither case, were there any facts to connect the driver to any illegal behavior. Stops were made in each case based only upon the officer's suspicion that something was unusual. Stops based upon this type of unsupported hunch fall below the standard articulated in *Terry*, 392 U.S. at 22.

The majority also fails to adequately distinguish the facts of this case from two Ninth Circuit cases cited by Richcreek. In both *United States v. Garcia-Camacho*, 53 F.3d 244 (9th Cir. 1995), and *United States v.*

Robert L., 874 F.2d 701 (9th Cir. 1989), the Ninth Circuit Court of Appeals held that police lacked reasonable suspicion to detain motorists based on facts similar to this case.

In *Garcia-Camacho*, border patrol agents stopped a motorist based on factors including: the occupants of the vehicle looked straight ahead when passing the agents, did not acknowledge the agents, the truck was the type that could be used for smuggling, the truck appeared heavily ladened, the truck accelerated and made a lane change near the agents, and the occupants turned around and looked at the agents with a surprised look. 53 F.3d at 246.

Similar factors were advanced to support a stop in *Robert L.*: the driver's eye contact with police, driver left an accident at a faster pace than other vehicles, the size of the vehicle's trunk, the youthful appearance of the driver, and that a juvenile was driving during school hours. 874 F.2d at 703.

In both cases the Ninth Circuit held that the emumerated factors were insufficient to support a reasonable suspicion of criminal activity. 53 F.3d at 249, 874 F.2d at 705. I believe the facts of the present case are even less supportive of a reasonable suspicion than those enumerated in either *Garcia-Camacho* or *Robert L.* Nowhere did Officer DeHaven suggest that Richcreek met any profile of certain types of criminals. Officer DeHaven's

decision to stop Richcreek amount to little more than his hunch that something "was not correct." The *Terry* court specifically stated that it had refused to sanction stops "based on nothing more substantial than inarticulate hunches." 392 U.S. at 22.

CONCLUSION

The stop of Richcreek was not based on reasonable suspicion of criminal activity. The stop was not justified by either the accident investigation or the suspicion of a crime justifications cited by the majority. The conduct cited by the majority is insufficient to provide a "particularized and objective basis" for concluding that Richcreek either had information related to the accident scene or was engaged in criminal activity.

I, therefore, respectfully dissent.

/s/
Edward C. Voss, Judge